DOCUMENT RESUME

ED 115 178 HE 007 032

AUTHOR Polowy, Carolyn I.
TITLE Collective Bargaining and Discrimination Issues in Higher Education. Special Report #23.
INSTITUTION Academic Collective Bargaining Information Service, Washington D.C.
SPONS AGENCY Carnegie Corp. of New York, N.Y.
PUB DATE Aug 75
NOTE 25p.

EDRS PRICE MF-$0.76 HC-$1.58 Plus Postage
DESCRIPTORS *Affirmative Action; *Collective Bargaining; Employer Employee Relationship; *Grievance Procedures; *Higher Education; *Methods; Negotiation Agreements; Negotiation Impasses

ABSTRACT

The increased intensity of antidiscrimination enforcement measures has caused colleges and universities to reassess their operational procedures affecting students and employees. In recent months it has become clear that the powerful forces of antidiscrimination and collective bargaining intersect at a number of critical points that need clarification, understanding, and a deep desire to find equitable solutions to the legitimate concerns of each party. This document lists suggestions for handling problems that may arise during the several phases of collective bargaining. Listed are suggestions concerning: (1) election campaigns; (2) current policies and practices; (3) membership on bargaining; (4) "good faith bargaining"; (5) preamble to the contract; (6) appointments, tenure, and promotion; (7) college calendar; (8) grievance procedures; (9) leaves of absence and health benefits; (10) nondiscrimination clauses; (11) general working conditions; (12) part-time faculty; (13) past practices or benefits; (14) personnel committees; (15) personnel files; (16) "recognition of agent"; (17) retirement of agent; (18) retirement plans; (19) retrenchment; (20) salary schedules, merit salary increases, promotion, etc.; (21) affirmative action plan note in contract; (22) fair representation; (23) picketing and strikes; (24) grievance procedures; (25) liability of employer; (26) illegal contract provision. (Author/KE)

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Collective Bargaining and Discrimination Issues in Higher Education

MONOGRAPH #1
AUGUST
1975

BY CAROLYN I. POLOWY*

Academic Collective Bargaining Information Service

One of the many problems facing university administrators and faculty unions is the impact upon campus relationships of laws prohibiting discrimination and the variety of court, board and executive decisions being made in conjunction with the enforcement of these laws. In order to offer the parties a clear picture of considerations relative to discrimination, which must be made in negotiations and contract administration, ACBIS asked Ms. Polowy to prepare this detailed study. We know it will be of considerable interest and help.

Edward P. Kelley, Jr.
Associate Director

George W. Angell
Director

*J.D. University of Wisconsin; Associate Counsel and Associate Secretary, American Association of University Professors, Washington, D.C. The views expressed are those of the author.

HE007032

The Academic Collective Bargaining Information Service, located at 1818 R Street, N.W., Washington, D.C. 20009, is a special project funded by the Carnegie Corporation of New York and sponsored by American Association of State Colleges and Universities, Association of American Colleges and National Association of State Universities and Land Grant Colleges to gather and disseminate information and provide research and consultation in the field of academic collective bargaining.

The Project attempts to identify those issues unique to higher education and to investigate the effects of collective bargaining on colleges and universities. It seeks solutions to the special problems arising from the interface between labor law and higher education. Its publications provide information on key issues in a simple, brief format for line administrators and others.

ACBIS is an objective information source whose neutral service enables college and university communities to confront important issues and gain a degree of competency in the field of collective bargaining.

Introduction

It has become increasingly clear that the actions of campus administrators and faculty representatives, from the commencement of an organizing campaign to the negotiation and administration of a collective bargaining agreement, must be tempered and measured by an understanding of equal employment opportunity principles. The collective bargaining process itself presents a sterling opportunity for the examination of discriminatory policies or practices which affect faculty employment because, in the negotiation and administration of a contract, the resolution of discrimination problems becomes a mutual obligation shared by the administration and the faculty bargaining agent. This joint responsibility provides added impetus for an institution to address and resolve discrimination issues.

The purpose of this paper is to explore some of the interrelationships between the collective bargaining process and equal employment issues. The National Labor Relations Act,[1] the federal collective bargaining statute, is the focal point of the labor law discussion for several reasons. The federal statute has had a significant impact on the drafting and interpretation of state labor legislation and thus, an understanding of federal labor law provides a foundation for comprehending various state public employee bargaining laws. As a federal law, the National Labor Relations Act stands on an equal footing with federal equal employment laws and the interrelationship or conflict between collective bargaining obligations and equal employment issues has been providing a particularly interesting and continuously evolving subject in the federal arena.

First, the federal labor statute which is applicable to private colleges and universities will be discussed underscoring the Act's application to discrimination in employment based on race, sex, religion, national origin or color. Next, four federal equal opportunity laws, Title VII of the 1964 Civil Rights Act,[2] the Equal Pay Act,[3] Executive Order 11246 as amended,[4] and Title IX of the 1972 Education Amendments[5] will be briefly described, emphasizing their impact on labor relations matters. Finally, some suggestions for higher education collective bargaining in the context of equal employment obligations will be given.

To the extent possible, and where appropriate or helpful, an attempt will be made to shape the principle of law, which frequently arises in an industrial setting, to conceptually fit a situation involving faculty organizing or collective bargaining and campus equal employment issues. Much of the discussion is applicable to both faculty and nonfaculty employees.

Some General Considerations About Employer and Union Discrimination and the National Labor Relations Act

The National Labor Relations Act (the Act or NLRA), as amended, does not have as a primary purpose the protection of equal employment opportunity. Rather, the Act protects, under Section 7, the right of employees of nonpublic employers to join or not to join labor organizations, to bargain collectively through chosen representatives and "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[6] The NLRA prohibits certain employer and union practices which interfere with these protected rights. Section 8(a)[7] of the Act provides a list of prohibited activities for employers; Section 8(b)[8] provides a somewhat parallel list of prohibitions for employee representatives. Violations of these sections are called unfair labor practices and are remedied by application of the broad remedial powers of the National Labor Relations Board[9] (the Board) and through the courts.[10]

Under the National Labor Relations Act, an employer is prohibited from discriminating against his employees because of their union or protected concerted activities. The Board has been urged to hold that employer discrimination based on race, national origin, religion or sex interferes with employee Section 7 rights and therefore violates Section 8(a) of the NLRA. While the Board has never fully adopted this theory, it has consistently held that where there is a nexus between employer discrimination against minorities or women and employee conduct protected under the NLRA, a violation of the Act will be found. As explained by the Board:

This is not to say categorically that discrimination on the basis of race, color, religion, sex or national origin is necessarily or always beyond the reach of the statutes. Such discrimination can be violative of Section 8(a) (1), (3) and (5) in certain contexts, and we have so held. However, in each of these areas in which we have decided issues involving discrimination there has been the necessary direct relationship between the alleged discrimination and our traditional and primary functions of fostering collective bargaining, protecting employees' rights to act concertedly and conducting elections in which the employees have the opportunity to cast their ballots for or against a union in an atmosphere conducive to the sober and informed exercise of the franchise.[11]

The Board has found a direct relationship between employer discrimination against minorities and women and the proscriptions of the Act in a variety of cases. For example, where employees or potential employees have protested invidious discrimination directly to an employer[12] or have filed complaints with equal employment agencies, the Board has held such activities to be protected under the Act.[13] Where an employer refuses to bargain about discrimination issues with the bargaining agent or discharges the group of minority or female employees about which the representative is attempting to bargain, unfair labor practice charges have been upheld.[14] If an employer assists or consents to discriminatory acts of the union, both the employer and the union will be found to have violated the NLRA.[15]

As a statutory representative and collective bargaining agent, the employee representative has been held to a high duty in its relationship with the represented employees. Much has been written about this obligation, known as the duty of fair representation, a principle which was first applied by the Supreme Court to union activity under the Railway Labor Act[16] and later adopted by the Board as applicable to union conduct under Section 8(b) of the NLRA.[17] Under the doctrine of fair representation, the employee representative must "represent non-union or minority union members...without hostile discrimination fairly, impartially, and in good faith."[18] As interpreted by the Board, the duty of fair representation prohibits a union, as statutory collective bargaining agent, "from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[19]

The duty of fair representation is applicable to virtually all union activities which affect represented employees and relate to the bargaining unit — contract negotiations, administration of contracts, handling of employee grievances, or referral of employees for work.[20] It is a broad duty applicable to day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by the contract. Moreover, the union's duty requires it to be responsive to the needs of its particular constituents. For example, if a majority of the represented employees are Spanish-speaking, the union must provide bilingual services.[21] Fair representation also acts as a check on union actions where considerations of an employee's race, sex, color, religion or national origin may be motivating factors adversely affecting an employee's rights or status.[22]

The Board has yet to deal with a case of minority or sex discrimination arising in a university setting. Due to the Board's current position on employer discrimination, faculty and their collective bargaining representatives are less likely to file employment discrimination complaints with the Board than with other federal agencies. However, the Board is being pressured to enforce more fully the principles and obligations imposed under federal equal employment laws and it is likely that invidious employment discrimination will be scrutinized carefully when raised in the context of unfair labor practice charges filed against private colleges and universities or any other employers. The Supreme Court has cautioned the Board that it may not enforce "the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."[23] Recently, the Court stated:

Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority...and it is commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part. (citations omitted)[24]

However, the full accommodation of traditional labor law principles to employer and union fair employment practice obligations has yet to be established.

Campaign Conduct — Elections

Under the statutory authority of the NLRA, the Board certifies employee representatives for collective bargaining by processing petitions for elections and by conducting secret ballot elections.[25] Although Board election processes have only been available to private colleges and universities since 1970,[26] the general principles which have been applied to the conduct of elections in other industries have been applied to college campus elections.

The Board's primary concern is that an election take place within "laboratory conditions" to the extent possible so that employees may make reasoned choices concerning representation through secret ballot elections.[27] In order to protect the integrity of its processes, the Board investigates allegations that conduct prior to or during an election interfered with proper election conditions.[28] Such complaints are filed with the Board either as objections to the conduct of the election[29] or as unfair labor practice charges. If the allegations are proven meritorious, the Board will order a rerun of the election or may issue a bargaining order.[30]

In the context of a college or university election campaign, issues may arise concerning the attitudes of campus administrators or faculty unions toward minorities and women. An improper portrayal or treatment of those issues by either side may provide a basis for filing objections or unfair labor practice charges. Clearly, if promises of benefits by the administration or threats by either side are linked to statements concerning women or minority groups, the Board will order remedial action. For example, in one case considered by the Board,[31] after a petition for an election was filed, the employer called several employees into his office and told them, *inter alia*, that the Spanish-speaking employees would not find work in union shops, that union shops had no Spanish-speaking foremen and that some work previously done by men would be done by women. The employer also suggested that the union did not accept female members and advised female employees on layoff that he would not be able to call them back if they voted for the union. The Board held that the employer's conduct interfered with the employees' free choice and ordered a new election. The Board applied its general theory that:

> **Unsatisfactory conditions for holding elections may be created by promises of benefits, threats of economic reprisals, deliberate misrepresentation of material facts by an employer or a union, deceptive campaign tactics by a union, or by a general atmosphere of fear and confusion caused by a participant or by members of the general public.**[32]

Adding an element of prejudice or sex discrimination to a campaign where one of the other prohibited elements is present will only magnify or compound the unlawful character of the conduct.

Employer or union attitudes towards minorities and women constitute legitimate issues in election campaigns. A union may be proud of its civil rights position, may find the employer's equal employment activities inadequate and may wish to point out the history of union efforts to end invidious employment discrimination. On the other hand, the employer may wish to publicize the union's history of discriminatory conduct while emphasizing its own affirmative action efforts and progress. The Board does not prohibit a fair discussion of the issues and takes the position that electioneering will be curbed only in extreme situations.

Thus, if in an election campaign, the employer or union discuss issues concerning minorities or women, the statements will not interfere with an election if they are relevant,[33] truthful,[34] and not coupled with threats,[35] promises of benefit or other prohibited conduct. For example, the Board has determined that an employer's statements about a union's history of excluding blacks from membership and from the union's skilled work were relevant campaign comments based on the theory that "no one would suggest that Negro employees were not entitled to know that the union which seeks to represent them practices racial discrimination."[36]

The Board has similarly permitted unions to address minority and discrimination issues in campaigns. In one case where the union's campaign included appeals to racial solidarity and publications of its efforts to further the civil rights movement, the Board concluded that such appeals

were lawful. The union's campaign did not aim at racial divisiveness and the Board found the union's approach in keeping with the Act's purposes:

> **...[T]he theme of the campaign was that Negro solidarity through unionism in facing barriers to equality with whites is but a lawful method of concerted action which all employees may, under the protection of the Act, use to better their lot in society.**[37]

The Board's tolerance for the inevitable and normal propaganda of a campaign does not extend to highly inflammatory campaign speech or hate literature. In another case considered by the Board, even though the employer's distribution of campaign literature was not accompanied by other unlawful conduct, the Board held that the employer overreached the bounds of permissible pre-election conduct. The Board found that the literature served no purpose "except to inflame the racial feelings of voters" and thus inhibited an "informed exercise of the franchise."[38]

In view of the publicity which campus affirmative action has received in the past few years, it is likely that equal employment issues will be discussed in campus organizing campaigns. Dissatisfaction with the administration of equal employment goals and policies may be a factor contributing to faculty dissatisfaction and campus organizing. A union's appeal to faculty members during a campaign may have to include exposure of its track record on behalf of women and minorities. A college or university which has moved in the direction of upgrading the rank, salaries and opportunities of women and minorities may have a powerful propaganda tool in a campaign to counteract union promises. If abuses occur in the campaign process, Board remedies will be available.

The Appropriate Unit

One of the first questions raised when an election petition is filed is which group of employees constitutes an appropriate bargaining unit. In cases involving higher education institutions, the unit determination question has posed a knotty problem for administrators, faculty associations and the NLRB.[39] Issues have included whether part-time faculty,[40] department chairpersons[41] or professional staff[42] should be included in a faculty bargaining unit.

In the absence of an acceptable agreement between the parties, the Board will make a determination as to which employees share a sufficient "community of interest" to be included in the same bargaining unit. The Board has developed a notion of community of interest which looks to the similarity of employees' skills and their common interests in wages, hours and other conditions of employment as well as to the administrative structure of the employer. Thus, a Board determination of an appropriate unit for the purpose of collective bargaining will not rest on any single factor and is guided by the particular facts at the place of employment and Board experience in an industry.

In this framework, the Board has consistently held that a requested unit formed solely upon the race of the employees is inappropriate.[43] The Board has similarly long denied requests for sex segregated units.[44] The Board's principal basis for refusing to entertain petitions for sex or race segregated units has been the well established belief that employees who are similarly situated and have similar employment concerns should be represented in the same bargaining unit in order to effectuate the purposes of the Act.[45] The Board's considerations today would also be influenced by developments in equal employment and constitutional law.

Certification and Union Discrimination

Board certification is comparable to a federal representation license which runs to the union, not the employer. As a result of its federal nature, the Board is restricted from granting certification in violation of constitutional principles. Because Board certification establishes the union as the exclusive bargaining representative for unit employees,[46] a special duty is imposed on the union to fairly represent all bargaining unit employees. Both characteristics of certification may require that the Board refuse to certify or revoke certification where union discrimination based on race, sex, color, national origin or religion or other unlawful or arbitrary considerations is established.

In the course of election proceedings, an employer may raise as a defense to Board certification the union's inability to represent all unit employees due to the union's history of discrimination. Therefore, unions which systematically exclude minorities or women from membership or fail to

represent them fairly may be denied representational status. Based upon the Fifth Amendment prohibition against federal government support of or participation in unlawful discrimination, the Board may not lend government assistance to prohibited discrimination by certifying a union which practices discriminatory policies.[47] "Thus, what the Board lacks is not the statutory power to withhold the certificate, but rather the constitutional power to confer it."[48]

In the past, while the Board acknowledged the constitutional restraints on its actions, it took the position that it would dismiss a petition for an election on the grounds of union discrimination only if the employer raised and fully substantiated the defense of union discrimination prior to an election.[49] However, the Board was taken to task by the U.S. Court of Appeals for the Eighth Circuit for its approach. The court, In *N.L.R.B.* v. *Mansion House Center Management Corp.*,[50] upheld the employer's right to challenge the certification on the grounds that the union was incapable of representing employees fairly due to the union's past pattern and practice of race discrimination, even though the company belatedly raised the defense after the election. The court directed the Board to consider and weigh all relevant and material evidence of past union discriminatory practices or evidence of affirmative acts aimed at undoing past discriminatory practices to determine the appropriateness of certification. In particular, the Board was told to examine the type of evidence admissible in Title VII cases, such as statistical data which may establish *de facto* discrimination.

While the Board has not accepted the *Mansion House* decision *in toto,* it subsequently held in *Bekins Moving & Storage Co.*,[51] that the employer may file post-election objections protesting Board certification of the union based on evidence of a union's exclusion of minorities and women from membership or failure to represent employees fairly because of discriminatory reasons.

Due to the problems raised by the decision, the *Bekins* procedure may be revised in the not-so-distant future. The Board members' separate opinions strongly reflect the intra-Board conflict which has surfaced in other cases involving race or sex discrimination issues. It still is not clear whether the Board whould be constitutionally required to consider issues of union discrimination prior to directing an election rather than after the Board's processes have been used by a possibly uncertifiable union. The Board will also have to address itself more fully to the problem of abuse of the *Bekins* defense. In order to avoid frivolous objections from employers interested solely in delaying their collective bargaining duty, the Board may have to establish certain basic evidentiary criteria which must be met prior to requiring a hearing on the merits of the employer's complaint. The Board itself indicated in *Bekins* that its newly initiated method of filing post-election objections would be subject to further scrutiny but would be in effect until a more appropriate mechanism is devised to avoid the award of certification to a discriminatory union.[52]

If a union fails or refuses, after it has been certified, to fairly represent all unit employees, without regard to considerations of race, sex, color, national origin or religion, other Board processes may be used to challenge the validity of the union's certification. The Board has long provided a procedural mechanism for revoking the certification of a union which practices discriminatory policies. A decertification petition[53] may be filed by an employee or the Board may, on its own motion, impose decertification as a remedy for union invidious discrimination.

Normally, once a union is certified or recognized and a contract has been negotiated, the Board will not entertain representation or decertification petitions during the life of the negotiated contract. A "contract bar" rule was adopted by the Board to permit the development of stable labor relations during the life of the collective bargaining agreement. However, the protection of this Board-developed rule is lost when an existing contract can be shown to be discriminatory. Thus, the Board has held that where an employee bargaining representative executes separate contracts for black and white employees or executes a single contract which discriminates between minority and white employees on racial lines, such contracts will not act as a bar to an election.[54]

Faculty bargaining representatives will have to be conscious of their equal opportunity obligations because certification may hinge upon the establishment and maintenance of legally sufficient policies and practices for minorities and women. While campus administrators could possibly benefit in the short term from an intransigent stand on equal employment issues, thus making the union's ability to fairly serve the interests of women and minorities difficult, no long term advantage would accrue from such action. Increased faculty dissatisfaction with an administration's position may

only strengthen the base of the faculty bargaining representative. In addition, while the NLRA may not directly proscribe all discriminatory practices on the part of administrators, other federal laws aimed at eliminating employment discrimination based on race, sex, religion, national origin or color most likely do prohibit the practices, and the faculty union or individual faculty members may be forced to file administrative complaints or lawsuits to resolve impasses on discrimination issues. The public exposure and criticism engendered by such suits have motivated other less image-conscious employers to resolve discrimination complaints without protracted legal proceedings. A college or university should consider loss of public confidence as an important factor in decisionmaking related to equal employment and labor relations problems.

Collective Bargaining and Equal Employment Issues

Under complementary sections of the Act, Section 8(a) (5)[55] and Section 8(b) (3),[56] an employer and an authorized employee representative may be found to have committed an unfair labor practice if they fail or refuse to bargain in good faith. Thus, the employer and union are required to meet with a *bona fide* intent to reach an agreement.[57] Good faith bargaining requires the parties to discuss all mandatory subjects of bargaining which include virtually all topics related to wages, hours and other terms or conditions of employment. Issues of minority or sex discrimination are most often interrelated with wage determinations, employee classifications, promotion opportunities and employee benefits. They are, therefore, proper subjects of collective bargaining and the Board has so held.[58]

One way of dealing with equal employment obligations in the context of contract negotiations and collective bargaining has been to incorporate into the collective bargaining agreement a general nondiscrimination clause which prohibits all forms of invidious employment discrimination. However, the Board does not permit employer acceptance of a general contract nondiscrimination clause to negate or diminish the employer's duty to bargain about the elimination of specific discriminatory employment practices.[59] Moreover, if an employer-proposed nondiscrimination clause attempts to limit the union's ability to carry out its duty of fair representation, an 8(a) (5) violation will occur if the employer insists upon the clause.[60]

Neither the employer nor the employee representative may insist that the other agree to an illegal contract provision. Where agreement to proposed contract language would subject either party or both to meritorious charges under federal or state equal employment law, unfair labor practice charges may be filed with the Board.[61]

If a discriminatory contract is negotiated, it will not provide a defense to charges filed against the employer or employee representative under Title VII of the 1964 Civil Rights Act,[62] the Equal Pay Act.[63] or the Executive Orders.[64] A contract which discriminates on its face against minorities or women may be sufficient to establish a *prima facie* case of employment discrimination under equal employment laws.[65] Moreover, a union may itself decide to file charges with the EEOC or other federal or state agencies if the employer refuses to incorporate nondiscriminatory contract terms.[66] Also, if a union refuses to cooperate, an employer may unilaterally change terms or conditions of employment to conform to equal employment requirements or to obligations imposed by an affirmative action agreement.[67] The multitude of arenas open to complaints of employment discrimination prevents the enjoyment of any long-term benefits from a discriminatory collective bargaining agreement.

The duty to bargain continues throughout the life of the contract. Therefore, discrimination issues arising during the term of the contract may be worked out in subsequent negotiations or may be processed through the contract grievance-arbitration procedure. Recently, the Supreme Court gave added protection to the smooth operation of contractual grievance procedures in holding that employees lose the protection of the NLRA when they engage in concerted activity such as boycotts or picketing to protest discriminatory employment practices where union representatives are processing the complaints through the contractual grievance machinery.[68] However, concerted activity outside of the collective bargaining processes which would be viewed under the NLRA as activity taken in derogation of the union's exclusive representational status might, under certain circumstances, receive the protection of Title VII or other equal employment laws.[69]

In order to obviate the need for faculty to resort to federal and state agencies or other complaint mechanisms outside the institution, fair and efficient grievance procedures should be developed and incorporated into the collective bargaining agreement. Of course, to meet all obligations, fair

procedures must be combined with a nondiscriminatory contract administered in a nondiscriminatory manner. A contract which discriminates on its face merely invites complaints. Moreover, if an arbitrator is presented a grievance which involves a discriminatory contract clause, the arbitrator will be required to render what amounts to a discriminatory decision unless other contract language permits consideration of equal employment commitments and applicable laws where appropriate.[70] The Supreme Court has firmly held that employee equal employment rights exist apart from any contract rights given employees through the collective bargaining agreement. Thus, equal employment rights cannot be bargained or arbitrated away:

> **When union and employer are not responsive to their legal obligations [to resolve discriminatory practices], the bargain they have struck must yield *pro tanto* to the law, whether by means of conciliation through the offices of the EEOC, or by means of federal court enforcement at the insistance of either that agency or the party claiming to be aggrieved.[71]**

Therefore, it is essential that the contract clearly reflect a commitment to any applicable equal opportunity and affirmative action responsibilities and that the agreement be administered in a nondiscriminatory fashion.

Federal Equal Employment Laws
Title VII of the 1964 Civil Rights Act

In March of 1972, Title VII of the 1964 Civil Rights Act as amended (Title VII)[72] became applicable to all public and private educational institutions which have fifteen or more employees. Virtually every higher education institution in the country is subject to Title VII jurisdiction and is therefore required to treat all employees in a manner free from discrimination based on race, color, religion, sex or national origin in all policies and practices involving hiring, discharges, compensation, classification of employees or applicants for employment, and any other term or condition of employment.

Title VII also limits the actions of collective bargaining agents. Employee representatives violate Title VII if they discriminate against their members or discriminate in referring employees for work or training programs, or if they cause an employer to illegally discriminate against employees.[73] A breach of the duty of fair representation by the employee representative may provide a basis for an employee Title VII complaint.[74]

Prior to the 1972 amendments to Title VII, the Equal Employment Opportunity Commission (EEOC or the Commission) which administers Title VII had no power to enforce or seek enforcement of its own determinations. Enforcement of Title VII was largely the responsibility of private individuals who, after fulfilling the procedural requirements of filing a complaint with the EEOC and a state fair employment practice agency, were required to litigate their Title VII complaints in federal court. When Title VII was amended in 1972, Congress gave the EEOC the authority to seek enforcement of Commission decisions through the federal courts but it did not abolish the right of aggrieved persons to pursue private Title VII court actions. Nor did Congress choose to limit the right of discriminatees to concurrently pursue relief under Title VII and other equal employment laws. The Supreme Court has cited Title VII legislative history to support employee right of access to multiple forums for employment discrimination complaints:

> **Legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination... Consistent with this view, Title VII provides for consideration of employment discrimination claims in several forums....Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. (citations omitted)[75]**

Thus, an employee who receives an unfavorable decision from the NLRB or another agency is not foreclosed from pursuing a Title VII complaint. While the employee will have to satisfy appropriate procedural requirements such as filing the Title VII charge with the EEOC within 180 days of the discriminatory act, the respondent employer or union will be unsuccessful in arguing that the prior Board proceedings are *res judicata* to the issues raised in the Title VII case.[76]

Most administrators and faculty bargaining representatives must be conscious of faculty Title VII rights since either or both are potentially liable for discrimination under Title VII. It is clear that "rights guaranteed by Title VII are not rights which can be bargained away by the union, the employer or both acting together."[77] The institution and faculty bargaining representative may be found liable for back pay, punitive damages and other extraordinary relief if both remain obdurate or intransigent in perpetuating discrimination.[78]

Even though the EEOC has recognized that "employment standards in academia are somewhat *sui generis*,"[79] there has been no indication that the Commission or the courts intend to adopt special rules or methods of analyses for Title VII complaints filed against higher education institutions. For example, in considering a complaint which alleged sex discrimination in a university's denial of tenure and contract renewal, the Commission adopted a standard of proof similar to that applied to a refusal to hire case in an industrial setting. To establish a *prima facie* case, the complainant thus had to show that she was a member of a class protected by Title VII; that she applied for (or was available for) and was qualified for the position; that in spite of her qualification, she was rejected; and that after her rejection, the position remained open and other persons were considered. The burden of proof then shifted to the institution whose administrators had to "articulate some legitimate nondiscriminatory reason" for their decision.[80]

The reasons advanced to justify employment actions will be examined in light of all the surrounding circumstances to determine if they are pretextual or have an adverse impact on a particular group of protected employees. Ultimate liability for unlawful discrimination will be placed on the administration and, in certain cases, on the union, even if the source of discriminatory conduct can be identified as specific individuals on a faculty tenure review committee or a department chairperson. Ratification by an administration of a discriminatory personnel decision is sufficient for Title VII culpability.[81] Moreover, a faculty bargaining representative will not be immune to Title VII liability if it participates in an unlawful, discriminatory decision, perpetuates past discrimination through contract language or contract administration or fails to process discrimination grievances.[82] Both the institution and the faculty collective bargaining representative will have to examine, prior to bargaining, all campus policies and procedures to determine not only if they are discriminatory on their face, but also whether they perpetuate past discrimination or have a discriminatory impact on certain protected groups of faculty.[83]

The Equal Pay Act

The Equal Pay Act, which has been in effect since 1963, was amended in 1972[84] to include professional, administrative and executive employees under its coverage. The provisions of the Equal Pay Act, which are incorporated in the Fair Labor Standards Act, apply to all public and private higher education institutions. The Equal Pay Act is unique in that it focuses only on eliminating sex discrimination in salaries or wages and mandates equal pay for equal work on jobs which require substantially equal skill, effort, and responsibility, and which are performed under similar working conditions.[85]

The provisions of the Act permit aggrieved persons to seek the aid of the Wage and Hour Division of the Department of Labor or to file private lawsuits. In 1974, Congress authorized the Secretary of Labor to recover in Equal Pay Act cases the amount of outstanding unpaid wages with an equal amount as liquidated or double damages.[86] This new provision provides added impetus for employers to settle Equal Pay Act claims. Moreover, another 1974 amendment permits the Secretary to accept, investigate and litigate anonymously filed complaints.[87] This new authority has already been given judicial support by one federal court of appeals.[88] Thus, complainants, whose identities need not be revealed can receive a certain amount of protection under the Equal Pay Act which is not available under Title VII.

It is well established that provisions in a collective bargaining agreement which permit discriminatory wage rates are not a defense to an Equal Pay Act suit since the statutory requirements enforced by the Act override contractual agreements.[89] Even though the employer and collective bargaining agent both agree to discriminatory salaries and rates of pay, the employer alone will generally be found liable for payment of back wages in an Equal Pay Act suit. It has been the policy of the Secretary of Labor to seek payment of back wages from the employer, not the union, and the union

is seldom joined as a party in an Equal Pay Act case. The Secretary takes the position that it is the employer who actually withholds payment of wages and, as a result, benefits both from the continued use of the funds and the competitive advantage gained over other employers who by complying with the Act must disburse additional monies. Thus, the employer is not permitted to avoid responsibility for restitution by shifting liability to the union:

> **The employer's retention of any part of the unlawfully withheld wages is a "continuing offense against the public interest"...and should not be supported by the processes of equity. Thus the Act does not, either by express provisions or by implied policy, provide the employer-defendant...with a cause of action against the collective bargaining agent of his employees.[90]**

Only if the union itself is actually guilty of withholding wages will liability be viewed as joint and several.[91] Thus, principal responsibility for examining and equalizing wage structures between male and female faculty lies with administrators even though salaries are bargained by a faculty collective bargaining agent.

There has been substantial documentation of the disparity in wages between faculty members based on sex.[92] The collective bargaining process has provided an appropriate context for evaluation of faculty salaries and correction in inequities. One well known case has been described by Professor Georgina Smith who actively participated in the effort of the Rutgers University faculty to correct salary deficiencies.[93] The first step was to run a multivariate regression analysis of salary survey data and qualifications.[94] Once the salary disparities were detailed, the Rutgers administration and the Rutgers AAUP, collective bargaining agent for the faculty, met to determine the amount necessary for remedying then current inequities and the methods for evaluating individual cases and distributing increases. The agreed upon principles and procedure were incorporated into the 1972-75 collective bargaining agreement. Similar salary evaluation processes have been implemented at other institutions. Bargaining for salary equity is a particularly good example of the positive effect which collective bargaining can have on resolution of campus equal opportunity problems.

Executive Order 11246 and Title IX

Executive Order 11246, as amended by Executive Order 11375, (the Orders)[95] is probably the most well known but least understood fair employment practice mechanism applicable to institutions of higher education. The purpose of the Orders has been explained by the Solicitor of Labor:

> **The goal of Executive Order 11246 is the attainment of equal opportunity in the employment practices of employers who are parties to contracts with the federal government. The Executive Order provides that those entering into contracts with the federal government or performing work on federally-assisted construction contracts agree by contract stipulation that they will not discriminate against an employee or applicant for employment with respect to such factors as race, color, religion, sex or national origin. The Orders require that as a conditon of doing business with the government, contractors, subcontractors, and those performing work on federally-assisted construction contracts will take "affirmative action" to insure that applicants are employed and that employees are treated without regard to race, color, religion, sex, or national origin. As a result, the affirmative action concept requires that employers seeking to do business with the federal government must do more than merely refrain from discriminatory practices and policies. They must take positive result-oriented steps toward the elimination of employment barriers to minorities and women.[96]**

The Orders and implementing regulations[97] are administered by the Office of Federal Contract Compliance in the Department of Labor. The Secretary of Labor has delegated chief contract compliance responsibility for contracts let to higher education institutions to the Office of Civil Rights at the Department of Health, Education and Welfare.

The Orders and implementing regulations have been determined to have the force and effect of law.[98] Therefore, the obligations imposed under the Orders cannot be bargained away or

compromised through negotiations.[99] Of particular concern for campus collective bargaining is the requirement under the Orders that recipients of federal contracts of $50,000 or more who employ 50 or more persons must prepare an affirmative action plan. The preparation of such a plan is a unique equal employment mechanism. It requires the contractor-institution to analyze the composition of its work force and set numerical goals and timetables to overcome underutilization of women and minorities.[100] The institution must also adopt and follow the nondiscrimination policy of the Orders.[101]

It is unclear whether an institution which has an obligation to prepare an affirmative action plan has a duty to consult with the collective bargaining representative during the plan's preparation. A duty to bargain could be alleged and possibly established under the National Labor Relations Act, although the rights of the respective parties would also be subject to interpretation and modification by the Labor Department's Office of Federal Contract Compliance[102] and any other federal agency which had compliance responsibility for the contract and the institution. Although the Executive Order does not by its terms apply directly to unions since they are not signatories to the federal contract, a prospective federal contractor may be required to submit a signed statement from the bargaining agent to the effect that the representative will cooperate in the implementation of the federal policies.[103]

Even if there were no absolute legal requirement to bargain, it may seem wise to do so since the promises made by a contractor in an approved plan may well take precedence over conflicting promises made in a collective bargaining agreement and could negate contract terms or interfere with reasonable expectations.[104] For example, if an institution is compelled under its affirmative action plan to take steps contrary to the terms or intent of the contract, the institution would not be required to arbitrate grievances arising from the action:

> **If arbitration can result in obstructing or thwarting the eradication of racial discrimination in employment, an employer is not forced to go through with it....A contractual duty is excused in cases where intervening government regulations render performance impossible....This does not mean that the arbitration section of the collective bargaining agreement is a nullity. It retains vitality in all respects save those instances where resort to the arbitral process may prevent the employer from complying with Title VII and Executive Order 11246 and from the implementation of the Affirmative Action Compliance Action Program.[105]**

Even though an institution's affirmative action commitments may overlap with subject areas covered in a negotiated agreement, a faculty bargaining agent may decide that it assumes too much legal responsibility if it actively participates in the development and execution of an affirmative action plan. Thus, an appropriate role for the bargaining agent may be one of reactor or observer, seeking to limit conflicts between contract terms and affirmative action obligations and bargaining about the effects of the plan on the bargaining unit. It may also be necessary for the bargaining agent to handle grievances which allege violations of the terms of the affirmative action plan, since the plan could be viewed as a standard incorporated into a contractual nondiscrimination clause, or the plan may actually be referred to and incorporated into the contract. In view of the large numbers of colleges and universities, both public and private, which are federal contractors, federal contract compliance obligations should be a consideration in the preparation of bargaining proposals and in the processing of discrimination grievances.

Although frequently not thought of as an equal employment statute, Title IX of the 1972 Education Amendments[106] prohibits employment sex discrimination in virtually all education programs or activities receiving or benefitting from federal financial assistance. Title IX enforcement is principally administered by the Office of Civil Rights at HEW, which recently issued final Title IX regulations.[107] Insofar as the Regulations affect employment, there are few significant deviations from the concepts embodied in interpretive guidelines in use by the EEOC to enforce Title VII of the 1964 Civil Rights Act. The most important distinction for the purposes of higher education concerns the fringe benefit regulations.[108] Institutions subject to Title IX are permitted either to offer plans which pay equal periodic benefits or to make equal contributions to fringe benefit plans for male and female employees. Title VII guidelines, however, require the payment of equal periodic payment.[109] Although the Title IX Regulations follow presently existing Labor Department regulations,[110] uniform federal policy has been promised in the near future. In a statement accompanying the release of the Title IX Regulations,

the Secretary of Health, Education and Welfare announced that the "President has directed the Equal Employment Opportunity Coordinating Council to study this issue further, in consultation with HEW, and to report back to him by October 15th[111]

The issue of equality in fringe benefits is particularly important for higher education employment because many institutions provide pension benefit plans which pay unequal monthly benefits to male and female faculty. Such plans have been found to violate Title VII of the 1964 Civil Rights Act by the Equal Employment Commission[112] and the two courts which have looked at the question have required the payment of equal benefits.[113]

The lack of uniform federal policy on "equality" in fringe benefits for men and women has supplied a rationale for the incorporation of fringe benefit plans into collective bargaining agreements which provide unequal periodic benefits, thus violating Title VII of the 1964 Civil Rights Act and exposing the institution and bargaining agent to liability. The bargaining process should certainly take into consideration the problems raised by a failure to provide, regardless of sex, equal fringe benefits. A bargaining agent may have no choice but to file charges under federal and state equal employment laws where it is unsuccessful in negotiating equal periodic benefit plans in order to fulfill its duty of fair representation of bargaining unit members.

Two other interesting aspects of the Title IX Regulations deserve mention. First, the regulations require that the institution "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee[114] sex discrimination complaints. Where a contractual grievance procedure is already in effect for faculty, consideration should be given to the appropriateness of that procedure for matters covered under the Title IX employment regulations. Both the adoption of employment grievance procedures which differ or vary from existing contractual mechanisms and the adoption of student grievance procedures which may address student complaints about faculty should be discussed or bargained about by the institution and the bargaining agent.

An appropriate time for discussions to occur is during preparation and completion of the institution's self-evaluation. Title IX regulations require institutions subject to Title IX to complete a self-evaluation of all policies and practices "concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with a recipient's education program or activity."[115] The self-evaluation is to be completed within one year of the effective date of Title IX regulations[116] and appropriate remedial steps are to be taken to modify or remove the effects of any discriminatory policies. Since matters covered under an existing collective bargaining agreement may well be scrutinized under the institutional evaluation, the faculty bargaining agent should cooperate and participate in the evaluation process.

Collective Bargaining Checklist

From the sampling of issues and problems which have been raised, it should be apparent that all campus employment policies and collective bargaining proposals must be filtered through an equal employment screen. The filtering process cannot be delegated solely to an affirmative action officer or considered only in hindsight. Equal employment policies enter into planning discussions as well as immediate decisionmaking about personnel matters. It is particularly important that those administrators and faculty members who participate in collective bargaining have some understanding of equal employment obligations.

If the collective bargaining process is to reflect the special interests of women and minorities, well-informed members of those interest groups should have a part in the collective bargaining process. Direct participation on a bargaining committee is one way. Establishing a "nondiscrimination" committee prior to bargaining to review all bargaining issues is another. There are certain obvious issues which should be examined. The following list, while not exhaustive, will serve to pinpoint some areas which deserve discussion in the context of collective bargaining.

Salaries: Even if a contract provides for the evaluation and equalization of salary inequities due to discrimination, the procedure for effectuating the equalization process should be sufficiently definite to permit its immediate implementation once the contract is signed. It is best to incorporate the exact

method for analysis and equalization into the contract along with a timetable for completing the process. The amount of money available for remedying salary inequities should be specifically designated or a general fund set aside. Grievances arising from the salary evaluation process could either be submitted through the regular grievance procedure, or could be handled through a separate grievance procedure operative only as long as the salary evaluation process is in force.

Grievance Procedures: Most collective bargaining agreements outline grievance-arbitration machinery for faculty complaints. It would seem wise to provide the same grievance mechanism for discrimination complaints as for other grievances. Although institutions subject to Title IX are required by the regulations to adopt a grievance procedure, the regulations do not provide or suggest specific requirements or components. In order to provide the greatest incentive for discrimination complaints, an expedited procedure could be outlined which provides as few as possible intermediate steps prior to arbitration. However, basic due process requirements should not be eliminated from grievance procedures used for discrimination complaints. The contract language should permit an arbitrator to apply equal employment laws in order to comply with Title IX requirements and to avoid discriminatory application of the contract or a continuation of discriminatory past practices. The grievance procedure should also provide for adequate monetary and other relief for discrimination complaints.

Fringe Benefits: If existing fringe benefit programs are to be maintained in the collective bargaining agreement, each benefit plan should be examined to determine if discriminatory provisions must be remedied prior to their incorporation into a contract. The most common problem areas involve discrimination based on sex in health or pension plans. For example, pension plans which provide different permissible or mandatory retirement ages for similarly situated men and women are subject to challenge under Title VII as are plans which provide unequal benefits.[117] The additional cost of providing equal benefits is not a defense to equalization.[118] Moreover, the Equal Pay Act provides that salary equalization cannot be achieved by lowering the benefits of either or both groups and thus usually requires that the lower benefits be increased.[119] Under the National Labor Relations Act, only the pensions benefits or presently employed faculty would be subject to mandatory bargaining, although the National Labor Relations Act permits, but does not require, bargaining for unit employees who have retired.[120]

Hospitalization and disability benefit programs are presently being attacked under Title VII for their failure to pay for hospitalization or disability leave due to pregnancy, abortion, miscarriage and complications due to pregnancy or childbirth. Some plans pay benefits under a "family" plan for pregnancy-related illnesses, but fail to make such plans available to single women. Normally, male employees are covered for every sickness or accident regardless of cause, or marital status. Recent federal court decisions have held that Title VII is being correctly interpreted by the EEOC in prohibiting the exclusion of maternity-related illnesses and disabilities from employer health and disability programs.[121] Therefore, insurance companies which offer plans to cover the required health areas should be contacted for cost information in preparation for contract negotiation.

Affirmative Action Plans: If an institution already has in force an approved affirmative action plan, it should, of course, be examined to determine what overlapping policies or commitments may require consideration and incorporation in the collective bargaining agreement. However, few institutions actually have plans which have been submitted to HEW or another federal agency and approved. Therefore, there will normally be an opportunity for the faculty bargaining agent to cooperate in the preparation or implementation of a plan. The recent Rider College-AAUP contract provides exactly for such a situation. The contract states:

AFFIRMATIVE ACTION

An Affirmative Action Committee, comprised of six members, chosen equally from representatives of the administration and the AAUP, shall be formed to consider and work on an Affirmative Action Plan for the College insofar as such plan may pertain to members of the bargaining unit. Such committee shall develop such a plan for submission to the Board of Trustees for approval or disapproval. If the committee is unable to develop an acceptable plan, or one on which a majority of the committee agrees, then the College shall be free to meet its legal obligation to adopt an appropriate Affirmative Action Plan for the College, provided that such plan shall not be

inconsistent with the terms and provisions of this Agreement, except as may be required by law. In the event any such proposed Plan is inconsistent with the terms and provisions of this Agreement, AAUP shall be entitled to submit an alternative plan to the applicable governmental authority. If the Committee cannot agree on a single plan to be submitted hereunder, then the Committee may submit more than one such plan for consideration by the Board of Trustees. After a plan has been approved by the Board of Trustees and filed with the appropriate federal governmental authority, the Affirmative Action Committee shall meet regularly to monitor such plan insofar as such plan may pertain to members of the bargaining unit.

Part-Time Employment: If part-time faculty are included in the bargaining unit, their opportunities and benefits should be given special consideration. Often, women comprise the majority of faculty with part-time status and their part-time employment has frequently been due to discrimination rather than to choice. Opportunities for full-time employment should be offered to interested part-time faculty when positions are available. Consideration should be given to providing contractual fringe benefits and faculty status with opportunities for tenure to those who continue in a part-time status. Part-time employment may be of interest for health reasons or gradual retirement to a larger number of faculty if faculty status is not diminished as a result of part-time appointment. If part-time faculty are included in a bargaining unit, a salary review would be critical since it is likely that the Equal Pay Act requires some relationship between the salaries accorded regular part-time faculty and full-time faculty.

Anti-Nepotism Policies: Employment policies which have a disparate impact on a group of employees protected by equal employment law should be carefully scrutinized. So-called "anti-nepotism" policies have been viewed as discriminatory against female faculty. Thus, a very narrowly drawn policy, if any, is sufficient to protect against spouses judging each other's work when a conflict of interest is likely or possible.[122]

Leaves of Absence: Short or long-term leaves of absence must be granted in a nondiscriminatory fashion. The duration of and benefits received during a leave of absence should not relate to discriminatory considerations. For example, if a long-term leave of absence is permitted for child-rearing or family emergencies, such a leave cannot be accorded only to female faculty members.

Reduction in Force/Retrenchment: One of the most problematic issues facing employers and collective bargaining representatives nationwide is the maintenance of affirmative action and equal opportunity obligations in the face of economic cutbacks, layoffs and necessary reductions in workforce. When layoffs unduly affect women or minorities the "last-hired, first-fired" seniority principle applicable in most industries is being challenged by minorities and women to maintain their positions recently acquired and opportunities for advancement.[123]

Serious cutbacks in higher education which have a disparate impact on recently hired women and minorities are likely to be similarly challenged. Contract retrenchment provisions should therefore allow for implementation of all feasible alternatives prior to layoff or termination of nontenured as well as tenured faculty. For example, one agreement sets out a series of alternatives which shall be implemented prior to reduction in full-time faculty:

If it is determined that no alternative to full-time faculty reassignment or reduction in force is possible, the procedures below shall be followed in order, as applicable, before termination of a full-time faculty member may occur.

(a) Shared load between disciplines, departments, colleges, or campuses

(b) Reassignment to another department, college, or campus

(c) Supplementation of teaching with non-teaching duties

(d) Shared teaching with other institutions

(e) Retraining

(f) Transfer to a non-teaching position

(g) Reduced load with proportionate reduction of compensation

(h) Early retirement[124]

Balancing the rights of tenured faculty with federal equal opportunity laws requires special consideration and attention. The provisions incorporated in the 1973-76 Temple University-AAUP agreement attempt to accommodate respect for tenure rights and affirmative action obligations:

> **"The Temple contract provides retrenchment of faculty as one of the last and most serious steps an institution of higher learning takes in times of financial crisis. Temple and AAUP agree that, as far as possible, the process of natural attrition shall be used instead of retrenchment. In the remote event of retrenchment, Temple and the AAUP shall meet to discuss the best way to implement reductions. Whenever possible, retrenchment should be consistent with the University's moral and legal commitment to Affirmative Action.**
>
> **The order of retrenchment within a department or program of instruction shall be:**
>
> **1. part-time faculty**
> **2. nontenured faculty**
> **3. tenured faculty, provided that the faculty with the least years of service to Temple University shall be released first.**
>
> **Either Temple or the AAUP may consider an order of retrenchment different from that listed above to take into account such important factors as:**
>
> **1. the faculty remaining shall have the requisite qualifications to perform the work required**
> **2. Affirmative Action goals**
> **3. academic excellence**
> **4. early retirement"**

Conclusion

With a basic knowledge of equal employment obligations and good faith efforts to fulfill the responsibilities imposed by federal equal opportunity laws, the relationship between a faculty collective bargaining representative and a university administration should produce positive solutions and creative mechanisms for handling and resolving campus discrimination complaints. Thus, the collective bargaining process may eventually become a logical "in-house" method of settling discrimination issues in higher education, a result which could benefit all parties concerned.

FOOTNOTES

1. 29 U.S.C. 151 *et seq.* (1970).
2. 42 U.S.C. 2000e *et seq.* (1970).
3. 20 U.S.C. 206 (1970).
4. The text of the Executive Order is found at 3 CFR 169, 173-81 *et seq.* (1973).
5. 20 U.S.C. 1681, *et seq.* (1972).
6. 29 U.S.C. 157.
7. 29 U.S.C. 158(a) (1)-(5).
8. 29 U.S.C. 158(b) (1)-(7).
9. 29 U.S.C. 160(a)-(c).
10. 29 U.S.C. 160(e).
11. *Jubilee Mfg. Co.*, 202 NLRB 272, 273 (1973).
12. See, e.g., *Tanner Motor Livery, Ltd.*, 148 NLRB 1402 (1964), *enforced*, 419 F.2d 216 (C.A. 9, 1965); *Washington State Service Employees State Council No. 18*, 188 NLRB 957 (1970); *Mason and Hanger-Silas Mason Co., Inc., 179 NLRB 434 (1969), enforcement denied*, 449 F.2d 425 (CA 8, 1971).
13. *Advance Carbon Products, Inc.*, 198 NLRB No. 106 (1972); *G.V.R., Inc.*, 201 NLRB 147 (1973).
14. In *Edmund A. Gray Co., Inc.*, 142 NLRB 590 (1963), the Board held unlawful an employer's elimination of female employees at the time the union was attempting to negotiate equal pay for the women. The employer's action was viewed as an attempt to bypass bargaining, an unlawful refusal to bargain under Section 8(a) (5) of the Act.
15. See, e.g., *Pacific Maritime Assn.*, 209 NLRB No. 88 (1974).
16. *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944). A union's breach of the duty to fairly represent employees is cognizable under state contract law or federal statutes. See, *Vaca* v. *Sipes*, 386 U.S. 171 (1967).
17. *Miranda Fuel Co., Inc.*, 140 NLRB 181 (1962) *enf. den.*, 326 F.2d 172 (CA 2, 1963).
18. *Steele, supra*, Note 16, at 204.
19. *Miranda, supra*, Note 17, 140 NLRB at 185.
20. See, e.g., *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957).
21. *Retana* v. *Apartment, Motel, Hotel & Elevator Operators Union Local No. 14, AFL-CIO*, 453, F.2d 1018 (CA 9, 1972).
22. See, e.g., *Pacific Maritime Assn., supra*, Note 15; *Houston Maritime Assn.*, 168 NLRB 615 (1967).
23. *McCullough* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963).
24. *Emporium Capwell Co.* v. *Western Addition Community Organization*, ____ U.S. ____ (1975), 88 LRRM 2660.
25. 29 U.S.C. 159.
26. See, *Cornell University*, 183 NLRB 41 (1970), in which the Board overruled its longstanding refusal to assert jurisdiction over private colleges and universities and, *C.W. Post Center of Long Island University*, 189 NLRB 904 (1971), in which the Board directed an election for a faculty unit.
27. See, *General Shoe Corporation*, 177 NLRB 124 (1948), where the Board held at 127: "The criteria applied...in a representation proceeding need not necessarily be identical to those employed in testing whether an unfair labor practice was committed....In election proceedings it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees..."

28. Under *Goodyear Tire and Rubber Co.*, 138 NLRB 453 (1962), the laboratory period begins with the filing of the petition and lasts through the election.

29. See, NLRB Rules and Regulations, 29 CFR 102.69(a).

30. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court held that a bargaining order is an appropriate remedy when the employer's unfair labor practices tend to undermine the union's majority and make a fair election impossible.

31. *Media Mailers, Inc.*, 191 NLRB 251 (1971); see also, *ITT Cannon Electric*, 172 NLRB No. 71 (1968), where the employer told the black employees that the union would discriminate against them while simultaneously threatening to terminate vacation benefits if the employees voted for the union, and *Granwood Furniture Co.*, 129 NLRB 1465 (1961), where a foreman told employees that if the union came in the company would lay off "colored employees" and hire whites.

32. *Sewell Mfg. Co.*, 138 NLRB 66, 70 (1962).

33. In *Sewell, supra*, Note 32, the Board stated: "This is not to say that a relevant campaign statement is to be condemned because it may have racial overtones."

34. See, *Hollywood Ceramics*, 140 NLRB 221 (1962), where the Board held: "An election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election."

35. See, *Gummed Shoe Products*, 112 NLRB 1092 (1955): "The Board normally will not censor or police preelection propaganda by parties to elections absent threats or acts of violence. Exaggerations, inaccuracies, partial truths, namecalling and falsehoods, while not condoned, may be excused as legitimate propaganda, provided they are not so misleading as to prevent the exercise of a free choice by employees in the election of their bargaining representatives. The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the unihibited desires of the employees cannot be determined in an election."

36. *Boyce Machinery Corp.*, 141 NLRB 756 at 763 (1963). While the employer's statements concerning the union's history of race discrimination were relevant, the employer coupled some of his remarks with threats of employment loss, thus coloring the nature of the statements. cf., *Shamay Hosiery Mills*, 120 NLRB 750 (1958); *Allen-Morrison Sign Co., Inc.*, 138 NLRB 73 (1962). See also *Bonwit Teller, Inc.*, 170 NLRB 399, 405 (1968), where the Board held that statements by the employer aimed at retaining the racially integrated character of the statewide unit did not violate the Act.

37. *Baltimore Luggage Co.*, 162 NLRB 1230, at 1234 (1967); see also, *Archer Laundry Co.*, 150 NLRB 1427 (1965); *Aristocrat Linen Supply Co., Inc.*, 150 NLRB 1448 (1965); cf. *NLRB* v. *Shapiro and Whitehouse, Inc.*, 356 F.2d 675 (C.A. 4, 1966), which was decided before *Baltimore Luggage Co., supra.*

38. See, *Sewell, supra*, Note 32, at 71 for a discussion of race as an issue in election campaigns. See also, Pollit, "The National Labor Relations Board and Race Hate Propaganda in Union Organization Drives," 17 *Stanford L. Rev.* 373 (1965); Sovern, "The National Labor Relations Act and Racial Discrimination," 62 *Columbia L. Rev.* 563 (1962).

39. See, Kennedy, "The Educators' Role in Educating the NLRB: Requirement of a Complete Record," *The Journal of College & Univ. Law*, Vol. 1, Summer 1974, pp. 305-317; Finken, "The NLRB in Higher Education." 5 *U. of Toledo L. Rev.* (1974), pp. 608-655; Kahn, "The NLRB and Higher Education: The Failure of Policy-Making Through Ajudication." 21 *UCLA L. Rev.* 63 (1973), pp. 89-160.

40. See, *New York University*, 205 NLRB No. 16 (1973) in which the Board excluded part-time faculty and overruled earlier decisions in which it had included part-time faculty; See also, *Farleigh Dickinson University*, 205 NLRB No. 101 (1973); *University of San Francisco*, 207 NLRB No. 15 (1973).

41. In *Rosary Hill College*, 202 NLRB 1137 (1973), the Board held that "...we are not persuaded, on the basis of our experience with university cases in which their supervisory status is in issue, that faculty department heads *generally* have or exercise supervisory authority as it is defined in the Act." For a discussion of the different approaches taken by Board members to the issue, see, Kennedy, *supra*, Note 39, at 308-311.

42. See, e.g., *Fordham University*, 193 NLRB 134 (1971); *Point Park College* 209 NLRB No. 152 (1974); *Florida Southern College*, 196 NLRB 888 (1972).

43. See, e.g., *American Tobacco Co.*, 9 NLRB 579 (1938); *Matter of Union Envelope Co.*, 10 NLRB 1147 (1939); *Interstate Granite Corp.* 11 NLRB 1046 (1939); *Floyd A. Fridle d/b/a/ Caroline Marble & Granite Works*, 11 NLRB 249 (1939); *Brashear Freight Lines, Inc.*, 13 NLRB 191 (1939); *Georgia Power Co.*, 32 NLRB 692 (1941).

44. See, e.g., *Rexall Drug Co.*, 89 NLRB 683 (1950); *Underwriter Salvage Co. of New York*, 99 NLRB 337 (1952); *Cuneo Eastern Press, Inc.*, 106 NLRB 343 (1953); *United States Banking Co.*, 165 NLRB 951, 1952 (1967).

45. For example, the principle established under Section 9a of the Act that the bargaining agent is the "exclusive representative" of bargaining unit employees cannot be adquately implemented if more than one bargaining agent represents employees who are employed by the same employer at a particular location and have similar employment interests and working conditions.

46. Section 9a provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment. 29 U.S.C. 159(a).

47. In *Independent Metal Workers Union, Local No. 1 (Hughes Tool Co.)*, 147 NLRB 1573 (1964), the Board held at 1294 that it: "...cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative." See also, *NLRB* v. *Mansion House Center Corp.*, 473 F.2d 471 (C.A. 8, 1973); cf., *Shelley* v. *Kraemer*, 334 U.S. 1 (1947); *Hurd* v. *Hodge*, 334 U.S. 24 (1947); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

48. *Bekins Moving and Storage Co.*, 211 NLRB No. 7, slip opinion at p. 5 (1974).

49. See, *American Mailing Corp.*, 197 NLRB 246 (1972) where the employer raised the issue of union sex discrimination but failed to substantiate the charges on the record during the preelection hearing. Cf., *E & R Webb, Inc.*, 194 NLRB 1135 (1972) where an issue was raised in a timely fashion as to whether the union was primarily a religious group unable to represent all employees but the contention was not substantiated on the record.

50. 473 F.2d 471 (C.A. 8, 1973).

51. *Supra*, Note 48.

52. See, post *Bekins* cases including *Bell & Howell Co.*, 213 NLRB No. 79 (1974); *Grant Furniture Plaza, Inc.*, 213 NLRB No. 80 (1974); *Grant Furniture Plaza, Inc.*, 213 NLRB No. 81 (1974); *Preform Company, Inc.*, 215 NLRB No. 9 (1974).

53. NLRB Rules and Regulations, 29 C.F.R. 102, 60(a).

54. In *Pioneer Bus Co.*, 140 NLRB 54 (1962), the Board held at 55:

> Consistent with clear court decisions in other contexts which condemn governmental sanctioning of racially separate groupings as inherently discriminatory, the Board will not permit its contract-bar rules to be utilized to shield contracts such as those here involved from the challenge of otherwise appropriate election petitions. We therefore hold that, where the bargaining representative of employees in an appropriate unit executes separate contracts, or even a single contract, discriminating between Negro and white employees on racial lines, the Board will not deem such contracts as a bar to an election.

55. Section 8(a) (5) provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." See, Note 46 for the language of Section 9(a).

56. Section 8(b) (3) provides that it shall be an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a)."

57. For a general discussion of good faith bargaining requirements, see, Morris, *The Developing Labor Law*, pp. 271-347 (1971).

58. See, e.g., *Farmers' Cooperative Compress*, 169 NLRB 290 (1968), *enf'd. in pertinent part*, 416 F.2d 1126 C.A. D.C., 1973) *cert. den.* 396 U.S. 903; *Southwestern Pipe, Inc.*, 179 NLRB 364 (1969), *mod. on other grounds*, 444 F.2d 340 (C.A. 5, 1971).

59. See, "Quarterly Report of the General Counsel," Office of the General Counsel, NLRB, June 20, 1975, at pp. 6-7, where the General Counsel takes the position that the employer's refusal to furnish copies of discrimination complaint to the bargaining agent violates Section 8(a) (5) of the NLRA.

60. *Southwestern Pipe, supra*, Note 58, at 374-376, 384.

61. See, generally, Morris, *supra*, Note 57, at 435-437.

62. *Norman* v. *Missouri Pacific Railroad*, I FEP 863, 868-69 (C.A. 8, 1969) *Quarles* v. *Philip Morris, Inc.* 279 F.Supp. 505, 519 (E.D. Va. 1968).

63. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 208-210 (1974).

64. *Savannah Printing Specialties & Paper Products, Local 604* v. *Union Camp Corp.*, 305 F.Supp. 632 (S.D. Ga., 1972); *Contractors Assoc. of Eastern Pennsylvania* v. *Secretary of Labor*, 311 F.Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (CA 3, 1971), *cert. denied*. 404 U.S. 854 (1971).

65. See *Blanton* v. *Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162, 2 F.E.P. cases 602 (N.D. Ga., 1970); *Bowe* v. *Colgate-Palmolive*, 272 F.Supp. 332, (S.D. Ind. 1967), *mod. on other grounds*, 416 F.2d 711 (C.A. 7, 1969).

66. A union may find itself on the horns of a dilemma when trying to decide what to do about discrimination in the bargaining unit. If the union does file Title VII charges on behalf of the employees it represents, it may expose itself to liability through a counterclaim by the employer. See, *Gilbert v. General Electric Co.*, 5 F.E.P. Cases 989, (E.D. Va. 1973). However, if the union fails to file charges, it may be open to liability under Title VII or other employment laws. See, Cases cited in Notes 103, 116. Most courts have upheld the union's right to file Title VII claims on behalf of its members, absent any special conflict of interest. See, e.g. *Air Line Pilots v. Ozark Air Lines*, 10 F.E.P. Cases 463, (N.D. Ill., 1975).

67. See, *Savannah, Printing Specialties, supra*, Note 64.

68. *Emporium Capwell Co.* v. *Western Addition Community Organization*, U.S. (1975); 88 LRRM 2660.

69. In *Emporium Capwell, supra*, Note 68, the Court left unresolved the question of what type of employee-concerted activity would be protected by Section 704(a) of Title VII which provides that "it shall be an unlawful employment practice...for an employer or union to discriminate

against an employee or member...because he has opposed any practice made unlawful by [Title VII] or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under [Title VII]..."

See, *Emporium Capwell*, 88 LRRM at 2668-69.

70. In *Alexander* v. *Gardner Denver*, 415 U.S. 36 (1974), the Supreme Court described the arbitrator's obligation by citing language from *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960):

An aribtrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the aribtrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. 415 U.S. at 53.

For a discussion of the arbitrator's dilemma in deciding cases involving discrimination, see, McKelvey, "Sex and the Single Arbitrator," 24 *Industrial and Lab. Rels. Rev.*, No. 3, April 1971, pp. 335-353.

71. *Emporium Capwell, supra*, Note 68, 88 LRRM at 2668.

72. Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. 2000e-1 (1970).

73. 42 U.S.C. 2000e-2(c).

74. See, e.g., *McFadden* v. *Baltimore Steamship Trade Assoc.* 352 F.Supp. 403, 411 (D.Md. 1973), *affirmed* 483 F.2d 452 (C.A. 4, 1973), where the employee alleged but failed to substantiate his allegation that he had been denied union membership because of his race in violation of Title VII and in derogation of the union's duty of fair representation.

75. *Alexander* v. *Gardner Denver, supra*, Note 70, at 47-48.

76. See, *Tipler* v. *E.I. du Pont de Nemours & Co.*, 443 F.2d 125 (C.A. 6, 1971) where the Court considered the effect of Board proceedings on a Title VII claim at p. 128-129:

The issue here is whether appellee's dismissal was in violation of Title VII of the Civil Rights Act of 1964. The NLRB decision, on the other hand, dealt with an alleged violation of the National Labor Relations Act. Although these two acts are not dissimilar, their differences significantly overshadow their similarities...absent a special consideration, a determination arising solely under one statute should not automatically be binding when a similar question arises under another statute...

See, also, *Alexander* v. *Gardner-Denver, supra*, Note 70, at pp. 47-54.

77. *Glus* v. *G. C. Murphy Co.*, 329 F.Supp. 563, 567 (W.D. Pa., 1971); see also, *Le Beau* v. *Libby Owens Ford Co.*, 484 F.2s 798 (C.A. 7, 1973).

78. See, e.g. *Carey v. Greyhound Bus Lines*, 500 F.2d 1372 (C.A. 5, 1974); An award of punitive or compensatory damages in addition to back pay and other forms of restituion may be requested, but the courts are divided on the appropriateness of such an award. lc.f.,, the rationale of the courts in *Stamps v. Detroit Edison Co.*, 365 F.Supp. 87 (E.D. Mich., 1973) and on appeal *E.E.O.C. v. Detroit Edison*, 10 F.E.P. cases 241, _____ F.2d _____, (CA 6, 1975) and cases sited therein at 10 F.E.P. Cases 243, 244.

79. EEOC Decision 74-15, 6394 CCH EEOC Decisions 4051 (1973).

80. See, EEOC Decision 74-15, *supra*, Note 79, at 4053, where the EEOC applied the same standard of proof enunciated by the Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Other EEOC higher education decisions do not differ significantly from 74-15. See, e.g., EEOC Decision 74-106, 6429 CCH EEOC Decision 4139 (1974); EEOC Decision 74-53, 6410 CCH EEOC Decisions 4096 (1973); EEOC Decision 74-87, 6416 CCH EEOC Decisions 4112 (1974); EEOC Decision 74-93, 6427 CCH EEOC Decisions 4139 (1974); cf., *Johnson* v. *University of*

Pittsburgh, 359 F.Supp. 1007 (D.C. Pa., 1973), with *Faro* v. *New York University*, 503 F.2d 1229, 30-31 (C.A. 2, 1974) where the Court stated:

of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.

81. In EEOC Decision 74-93, the Commission dismissed the University's defense that it was not responsible for the discriminatory acts of the department chairman:

It is clear that Respondent failed to maintain an atmosphere free of intimidation and insult based on employees' Title VII status and that Respondent University ratified, if it did initiate, Charging Party's discharge.
6426 CCH 4132 EEOC Decisions 4132 at 4133.

82. See cases cited in Notes 77, 78.

83. See, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) where the Court held at 431:

The Act [Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

and, La Noue, "Tenure and Title VII," *Journ. of College and Univ. Law*, No. 3, 1974.

84. Pub. L. No. 92-318, Title IX, Sec. 906(b) (1), 86 Stat. 373 (1972).

85. 29 US.C. Sec. 206(d) (1) provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establsihment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditons, except where such payment is made pursuant to (i) a seniortiy system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

See, *Corning Glass Works* v. *Brennan*, 414 U.S. 1110 (1974).

86. P.L. 93-259 amended 29 U.S.C. 216(c) in part to read:

"The Secretary may bring *an action* in any court of competent jurisdiction to recover the amount of the upaid minimum wages or overtime compensation and an equal amount *as liquidated damages.*" (emphasis added.) This power is apparently discretionary depending on the degree of "willfulness." See, *Coleman* v. *Jiffy June Farms, Inc.*, 324 F.Supp. 664 (S.D. Ala., 1970), *aff'd* 458 F.2d 1139 (C.A. 5, 1971) for more discussion of this section.

87. Id.

88. *Brennan* v. *Engineered Products, Inc.*, 8 EPD 9781, _____ F.2d _____ (C.A. 8, 1974).

89. See, Regulations of the Department of Labor for the Office of Federal Contract Compliance, 29 CFR Sec. 800:

Application to Labor Organizations. Section 6(d) (2) of the Act prohibits a labor organization, representing employees of an employer having employees subject to the minimum wage provisions of section 6, from engaging in acts that cause or attempt to cause the employer to discriminate against an employee in violation of the equal pay provisions. Agents of the labor organization are also prohibited from doing so. Thus, such a labor organization and its agents must refrain from strike or picketing activities aimed at inducing an employer to institute or

maintain a prohibited wage differential, and must not demand any terms or any interpretation of terms in a collective bargaining agreement with such an employer which would require the latter to discriminate in the payment of wages contrary to the provisions of section 6(d) (1).... Thus, where equal work is being performed within the meaning of the statute, a wage rate differential which exists between male and female employees cannot be justified on the ground that it is a result of negotiation by the union with the employer, for negotiation of such a discriminatory wage differential is prohibited under the terms of the equal pay amendment.

90. Brief for Plaintiff — Secretary of Labor entitled "Objections to Defendant's Motion to Join Additional Parties Defendant" filed in *Brennan* v. *General Electric*, Civil Action No. C72-965 (N.D. Ohio, 1974).

91. *Hodgson* v. *Sangner, Inc.*, 326 F.Supp. 371 (D.Md. 1971), *aff'd per curiam*, 462 F.2d 180 (C.A. 4, 1972).

92. See, e.g., Carnegie Commission on Higher Education, *Opportunities for Women in Higher Education*, pp. 115-121.

93. See, Smith, "Faculty Women at the Bargaining Table," *AAUP Bulletin*, Winter 1973, pp. 402-406.

94. Id., at 405, Note 8:

    In addition to sex and race, factors utilized in the study included degree, type of appointment (ten or twelve month, full-time or part-time), years of service with Rutgers, years since receipt of highest degree, number of professional articles and books published and division and department of the university.

95. *Supra*, Note 4.

96. Kilberg, "Current Civil Rights Problems in the Collective Bargaining Process: The Bethlehem and AT&T Experiences," 27 *Vand. L. Rev.* 1974, pp. 81-115, at pp. 82-83

97. The Regulations appear at 41 C.F.R. Sec. 60-1.1, *et seq.* (1973).

98. See, *Legal Aid Society of Alameda County* v. *Brennan*, 381 F.Supp. 125 (N.D. Calif., 1974); *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629 (C.A. 5, 1967); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3, IFEP Cases 36 (C.A. 3, 1964).

99. See, *Savannah Printing Specialties, supra*, Note 64.

100. Revised Order No. 4, 41 C.F.R. Sec. 60-2.1, *et seq.* (1974).

101. See, Section 202 of the Executive Order, 3 C.F.R. 169, 170-71 (1964) and 41 C.F.R. 60-1.2(a) and (b) (1973).

102. Kilberg, *supra*, Note 96, pp.101-113.

103. Section 203 (d), Executive Order 11246, *supra*, Note 101.

104. Cf., *Savannah Printing Specialties, supra*, Note 64 with *Jersey Central Power and Light* v. *IBEW Local Unions*, 9 FEB 117_____ F.2d _____ (C.A. 3, 1975); and *Watkins v. Steelworkers*, 369 F.Supp. 1221 (D.C. La., 1974).

105. *Savannah Printing Specialties, supra*, Note 64, at 636.

106. *Supra*, Note 5.

107. 45 C.F.R. 86. 1-86.71 (1975).

108. 45 C.F.R. 86.56 (1975).

109. E.E.O.C. Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.1-1604.10 (1972).

110. See, 41 C.F.R. 60-70.3(c).

111. Statement by Casper W. Weinberger, Secretary of Health, Education and Welfare, dated June 3, 1975.

112. E.E.O.C. Decision no. 74-118, April, 1974.

113. *Manhart v. City of Los Angeles*, 9EPD691, (C.D.Cal., 1975); *Robertson v. Reilly*, Case No. 4098, Vanderburgh Circuit Court, Indiana.

114. 45 C.F.R. 86.7(b) (1975).

115. 45 C.F.R. 86.3(c) (1955).

116. The effective dates of the Title IX Regulations is July 21, 1975. (45 C.F.R. 86.1).

117. EEOC Sex Discrimination Guidelines, *supra*, Note 108.

118. Id., at 1604.9.

119. 29 U.S.C. 206(d).

120. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

121. See, *Wetzel v. Liberty Mutual Insurance Co.*, _____ F.2d _____ (C.A.3, 1975); *Communication Workers of America v. AT&T*, _____ F.2d _____ (C.A. 2, 1975); *Sale v. Waverly-Shell Rock Board of* Education, _____ F.Supp. _____ (D.N. Iowa, 1975).

122. See, "Faculty Appointment and Family Relationship," AAUP Policy Documents and Reports, 1973 Edition; HEW Higher Education Guidelines for Executive Order 11246, at pp. 8-9.

123. *Waters v. Wisconsin Steel*, _____ F.2d _____ 8FEP Cases 577 (C.A. 7, 1974); *Loy v. City of* Cleveland _____ F.Supp. _____, 8FEP Cases 614 (N.D. Ohio, 1974). See also, *supra*, Note 103.

124. Agreement between Fairleigh Dickinson University and Fairleigh Dickinson Council of American Association of University Professors Chapter, September 1, 1974-August 31, 1976.